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Kushagra Yadav, *A Game of Plea Bargains: How Game Theory Explains Plea Bargaining and its Shortfalls in India, the U.S. and Around the Globe*, 9(1) NLUJ L. REV. 33 (2022).

A GAME OF PLEA BARGAINS: HOW GAME THEORY EXPLAINS PLEA BARGAINING AND ITS SHORTFALLS IN INDIA, THE U.S. AND AROUND THE GLOBE

~Kushagra Yadav[*]

ABSTRACT

Now and then plea-bargaining is thrown under the spotlight, sometimes as a silver lining for systems like India, where there is a dire need of speedy disposal of cases, and sometimes as a plague haunting the west. The most recent examples include the case of Benjamin Netanyahu; and of the Tablighi Jamaat, both generating mixed reactions. It is, therefore, to be analysed if and how plea-bargaining adds to the criminal justice system and what threats it presents. Plea-bargaining is a key area of intersection between criminal law and economics, and the answers can be explored through game theory. For evaluating strategies in practical scenarios, an empirical study has been carried out parallelly to know a player's decisions. It is presented that every player – the prosecutor, defendant as well as judge – indeed consider their interests but at the same time are bound by their duties due to societal influences. While the process has been relatively ineffective in India, it is necessary to consider the issues it faces in this

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jurisdiction. Additionally, the analysis of the procedure can help evaluate plausible solutions to the broader threats and disadvantages it brings to the system. Only that can help in envisioning a holistic implementation.

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I. INTRODUCTION

The COVID-19 pandemic highlighted unexplored fault lines in the criminal justice systems of most, if not all, nations. Not only was the need for expeditious amendments felt, but it was worsened by the challenges raised on the existing rules and procedures. Undeniably, it can be said that the law witnessed changes in all areas that it could have.

Under a similar scenario, the COVID-19 cases around the Tablighi Jamaat sprouted with a tint of controversy. Many attendees were allowed to go back to their respective nations after employing the system of plea bargains.[1] However, notably, this generated mixed reactions which is an indication of how plea bargains in India has been a complex affair.

When looking at the procedure of plea bargaining various mediating factors that can affect the application of such a bargain are required to be held in question. These factors could include the public backlash due to a feeling that justice has not been done, the caseload of courts, the essence of retributive 'vengeance' of victims which criminal suits are often laden with, the will and information of defendants and presence of other criminal procedures. In the aforementioned cases above, the court fined the attendees of the Jamaat after the guilty pleas, however, sentencing and charging pleas are not always this simple as the crimes get graver and the retributive feeling of the victims gets stronger.[2] Yet plea bargains hold an important position in law, especially in criminal procedure of the United

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[1] ANI, *Delhi court completes plea bargaining process in Tablighi Jamaat cases, trial to begin from Aug 10*, ASIAN NEWS INTERNATIONAL (Jun. 12, 2022), https://www.aninews.in/news/national/general-news/delhi-court-completes-plea-bargaining-process-in-tablighi-jamaat-cases-trial-to-begin-from-aug-1020200724124216/.

[2] *Id.*

States of America (U.S.A.), where a vast majority of cases are settled through plea bargains.[3]

Therefore, it is important to declutter the application of plea bargains in criminal procedure to ratify it as a procedural success in India too. This can be done by analysing the efficiency of these bargains in light of the aforesaid factors that affect the willingness of the participants and the bargaining power of the parties.

Plea bargains, as the name suggests, employ extensive negotiations before a decision can be reached. Such negotiations and bargains have been an extensive field of study in game theory, especially in the economic and financial discipline called the bargaining theory. Game theory is a tool for studying strategies employed in bargaining, negotiating and decision-making between two or more individuals who are assumed to be 'rational'. Such study is aimed at reaching better negotiation terms. It highlights the point that both parties in a bargain come out of it better off from their original position. Therefore, in a situation like that of plea bargains, using game theory can be helpful in recognizing the interests of both parties in the bargain. There is a stark difference between the effects of plea bargaining in India and in the U.S.A. This difference arises not only due to the difference in procedures of plea bargaining in both nations, but also due to the different influences they face. These include the impact of different procedural laws, the society and the criminal justice system at large, in both nations, and the influence these exert on those individuals who may wish to choose the option of plea bargaining. Thus, we analyse these influences

[3] K.V.K. Santhy, *Plea Bargaining in US and Indian Criminal Law Confessions for Concessions*, 7 NALSAR LAW REVIEW 1, 85, 87 (2013).

alongside the procedural differences of both nations to study the efficiency (or lack of it) of plea bargains for achieving their intended objective, i.e., increasing the conviction rates and fastening the disposal of cases.

For the purpose of studying the aforesaid subject, a few authorities have been referred to, and in parallel, certain necessary generalisations have been made in the course of applying the principal elements of game theory. For a more practical approach, an empirical study has also been carried out to see the practical application of the bargaining game the individuals are involved in. Respondents were included in a game situation similar to a bargain for a plea like a guilty plea. However, there still needs to be a qualitative analysis of the procedural systems, to sum up the effects and correlate them to the results of the empirical study. Since India borrowed a skeletal idea of plea bargains from the U.S.A, by referring to the American Model, it is important to read them in parallel.[4]

II. UNDERSTANDING PLEA BARGAINS

Plea bargaining as a formal judicial practice, was first legalised in the U.S.A. by their Supreme Court[5] and was then incorporated in various nations thereafter.[6] However it has been visible through the history of law and criminal systems. The idea of plea bargain rests upon two fundamental goals; *firstly*, removing illegal mediation processes between the victim and the accused and regulating the process under the law itself, and *secondly*, to

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[4] LAW COMMISSION OF INDIA, 142ND REPORT ON CONCESSIONAL TREATMENT FOR OFFENDERS WHO ON THEIR OWN INITIATIVE CHOOSE TO PLEAD GUILTY WITHOUT ANY BARGAINING, 1 (1991).

[5] Brady v. United States 397 U.S. 742 (1970).

[6] Cynthia Alkon, *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 355, 390 (2010).

reduce the possibility of burdensome and sluggish case disposal. Since a number of cases can be settled in pre-trials, the courts can have high conviction rates and low caseload, resulting in lesser or no delay in cases. In the case of *Hussainara Khatoon v Home Secretary, State of Bihar,* the Supreme Court highlighted its disappointment towards delay in cases, the court discerned,

> *"Even a delay of one year in the commencement of the trial is bad enough: how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice."*[7]

For a victim, a delayed trial can induce stress incurred over the trauma of the crime itself. The court, in the same judgement, also touched on how speedy trial is a constitutional guarantee in the U.S.A. under the Sixth Amendment.[8] Moreover, the U.S.A. has been quite successful in the disposal of criminal cases without much delay as well. A substantial part of this success does come from the plea-bargaining process. After World War II, disposals through plea bargains and dismissals made up 80% of all the cases discharged[9]. Today, this number is far higher as an even lesser number of cases reach and are disposed of by the jury (only around 2% of federal criminal cases are disposed of in trial by juries by 2018 in the U.S.).[10]

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[7] Hussainara Khatoon v. Home Secretary, State of Bihar 1979 AIR 1369 (India) ¶179.
[8] *Id.* ¶180.
[9] Jed S. Rakoff, *Why Innocent People Plead Guilty,* N.Y. REV. BOOKS (Jun. 12, 2022),). https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?lp_txn_id=1359216.
[10] Jeffrey Q. Smith and Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?* 101 JUDICATURE 4, 3 (2017), https://judicature.duke.edu/wp-content/uploads/2020/06/JUDICATURE101.4-vanishing.pdf.

Plea bargaining is a process of waiving certain constitutional rights (often the right to a public trial) by pleading guilty (or not contending the prosecution) in exchange for a shortened sentence, lesser charges or, conciliated punishment by the court. The process, however, needs to be voluntarily applied for by the accused, which is followed by bargains between the accused and the prosecution. Thus, it can be simplified as admitting a crime in exchange for a lenient punishment. It is in the interest of the convict as his punishment gets tweaked in his favour, as well as the prosecutors, victims, and courts, as time and public expense are protected alongside a quick disposal mechanism. It is commonly visible in forms of bargaining of charges (where certain charges can be dropped to shorten sentences), sentence bargaining (where the prosecutor prays a lower sentence duration than the maximum prescription), count bargaining (where the accused pleads for lower counts) or fact bargaining (where the prosecution regulates certain facts that can lessen the punishment's length or nature).

Indeed, there have been mixed reactions to the increase of plea bargaining in the U.S.A. criminal system. As the of the U.S. District Court for the District of Massachusetts – Judge William G. Young penned,

> *"Today, our federal criminal justice system is all about plea bargaining. Trials — and, thus, juries — are largely extraneous."*[11]

Where, on one hand, such pleas are touted as an important instrument for maintaining speedy trials, on the other, they are condemned

[11] William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 76 (2006).

for inhibiting 'proper' justice and said to put forward a possibility of framing innocents.[12]

Somewhere, these factors were also pondered upon while adopting the plea bargaining process in Indian criminal procedure, thereby, shaping the procedure differently from the process followed in the U.S.A.

A. U.S.A. AND PLEA BARGAINING

Plea bargaining is seen not just as a process of the flexibility of trials, as it has been presented as a process that is a social essentiality. Offering defendants incentives for their responsibility and cooperation is just one side of the coin. The American procedure considers it an important instrument in justice to the victim as they do not need to go through the pain of trials and also an opportunity for flexible and creative jurisprudence to be developed out of courts in new and emerging fields of crime.[13] The idea of pleas finds its origin within the principle of Nolo Contendere, which means "I do not wish to contend," and particularly refers to the charges brought against an individual. These can be taken as an implied admission of guilt but does not rule out the discretion of courts as these are not pleas of guilt. *Fox v. Schedit*[14], started with permitting such Nolo Contendere claims as an agreement between the government and the accused in lieu of his charges to be taken as true admission for a case. With the passage of time, this principle has been a right of individuals beyond the consideration of the court's acceptance or rejection.

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[12] Raymond I. Parnas & Michael B. Salerno, *The Influence behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U.C.D. L. REV. 29, 36 (1978).
[13] STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY? § 14-1.8 (AM BAR ASS'N 1997).
[14] Fox v. Scheidt, 84 S.E.2d 259 (N.C. 1954).

The guilty pleas are a waiver of the rights in the Fifth Amendment[15] and the Sixth Amendment[16] of the U.S.A. The Fifth Amendment is protection from self-incrimination while the Sixth Amendment prescribes the right to trial by jury (a criminal trial) in furtherance of which the defendant can confront the witnesses against them under due process of law. These both are bypassed if a plea is made on inducement of a lenient punishment resulting in non-requirement of trial and appeal. Thus, its constitutional position was in jeopardy which got cleared in *Bordenkircher v. Hayes*[17], where the U.S. Supreme Court accepted the constitutionality of such plea bargaining. The rationale was that the parties receive the mutual benefit while upholding the tenets of justice and equity. In *Brady v. United States* it was presented,

> *"Desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged"*[18]

This distinguishes it from the offence of compounding of felony where the individual mediates by paying the victim illegally. It can be seen that the development was purely by the courts of justice, thus, grey areas keep emerging and getting rectified by way of precedents too.

B. INDIA'S PLEA-BARGAINING PROCEDURE

India, on the other hand, opted for codifying plea-bargaining under its Criminal Procedure Code (CrPC) after thorough research by the Law

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[15] U.S. CONST. AMEND. V.
[16] U.S. CONST. AMEND. VI.
[17] Bordenkircher v. Hayes, 434 U.S. 357 (1978).
[18] Brady v. United States, 397 U.S. 742 (1970).

Commission of India while seeking inspiration from the American procedure.[19] The Law Commission presented plea bargaining for experimentation through its 142nd report. The same prescribed a manner that restricted plea bargaining to offences punishable with imprisonment of less than 7 years, paving the way to inculcate it into the statutory legislation[20]. The 154th report (and then the 177th report)[21] reiterated it as a tool for fastening the judicial procedures that can help in reducing delays in cases[22].

From here plea bargaining found its way into the CrPC in Chapter XXI-A, explaining the procedure, exceptions and limitations of it at length from Sections 265A to 265L. While the requirement of voluntariness stays essentially the same, a stark difference came after factoring in its criticism and the Law Commission's appeal regarding 'experimenting' with the process before accepting it completely. So, plea bargaining could only be used in the event of offences not punishable by death, life imprisonment, or a sentence of more than seven years in jail in India. Moreover, such bargains are not available for crimes concerning the country's socioeconomic situation or crimes against women and children under the age of 14[23]. This rules out certain acts notified in legislations like the Dowry

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[19] LAW COMMISSION OF INDIA, 142ND REPORT ON CONCESSIONAL TREATMENT FOR OFFENDERS WHO ON THEIR OWN INITIATIVE CHOOSE TO PLEAD GUILTY WITHOUT ANY BARGAINING, 6 (1991).
[20] *Id.*
[21] LAW COMMISSION OF INDIA, 177TH REPORT ON LAW RELATING TO ARREST, 111 (2001).
[22] LAW COMMISSION OF INDIA, 154TH REPORT ON THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974), 51 (VOL. 1 1996).
[23] The Code of Criminal Procedure, 1973, § 265-A, No. 2, Acts of Parliament, 1974 (India).

Prohibition Act, 1961,[24] the Commission of Sati Prevention Act, 1987,[25] the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989,[26] the Cinematograph Act, 1952,[27] the Cable Television Networks (Regulation) Act, 1995[28] etc. notified by the government.[29] The U.S.A. by far has notified minimum punishments for most punishable acts however, the case is not the same in India.[30] In India minimum punishment is not usually prescribed, admonition and probation are covered under §265-E of the CrPC.[31] Moreover, after hearing, if minimum punishments are prescribed, then ½ of the punishment has been taken as a standard.[32] When minimum punishments are not notified ¼ of the maximum punishment is taken as the standard for the purpose of bargaining.[33]

To sweeten the deal, the courts can provide compensation to the victims at their discretion[34] and the time that has passed since the accused has been in custody can be set off and included in the sentence of imprisonment.[35] Another essential point is the discretion of judges being

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[24] The Dowry Prohibition Act, 1961, No. 28, Acts of Parliament, 1961 (India).
[25] The Commission of Sati (Prevention) Act, 1987, No. 3, Acts of Parliament, 1987 (India).
[26] The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, No. 33, Acts of Parliament, 1989 (India).
[27] The Cinematograph Act, 1952, No. 37, Acts of Parliament, 1952 (India).
[28] The Cable Television Networks (Regulation) Act, 1995, No. 7, Acts of Parliament, 1995 (India).
[29] The list of Acts affected under sub-section (1) of section 265A of Cr.P.C. Central Government Notification by S.O. 1042(E), dated 11th July, 2006.
[30] Milton Heumann & Colin Loftin, *Mandatory Sentencing and The Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOCIETY, 393, 394 (1979).
[31] The Code of Criminal Procedure, 1973, § 265-E (b), No. 2, Acts of Parliament, 1974 (India).
[32] *Id.* § 265-E (c).
[33] *Id.* § 265-E (d).
[34] *Id.* § 265-E.
[35] *Id.* § 265-I.

limited in comparison to the prosecutor and being restricted by sentencing guidelines to reject the pleas in the U.S. This has been flagged as a potential loophole that can be used to coax innocents.[36] India too does not hold the discretion of the judge but the judge may deny the application for plea bargaining altogether.[37] This might be needed to be changed in course of time as a judge may play as a mediator in the proceedings of negotiation removing the threat of coercion or undue influence.

The burden of making any such updates and rectifications has to be borne by the legislators as the usage of plea bargains in a trial has been minimal in India, to provide any help in developing jurisprudence regarding it. It has been almost 18 years since the process was introduced in India. However, the peak we have touched on regarding the cases being disposed of by the use of this process is around 0.27% (in 2018) of all criminal cases[38] in India in comparison to around 95-97% of the U.S.A.[39]

III. HOW GAME THEORY APPLIES TO PLEA BARGAINS

Plea bargaining is a sophisticated process in itself. It is also important that the accused understand the gravity of his acts and the nature of the offence. The proceedings are also to be carried out in accordance with the due process defined by law. Although what goes on in the bargain is out of the control of law, and that's where individuals' rationality and

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[36] L Devers, *Research Summary: Plea and Charge Bargaining*, BUREAU OF JUSTICE ASSISTANCE, 2 1-6 (2011).
[37] The Code of Criminal Procedure , 1973, § 265-B, No. 2, Acts of Parliament, 1974 (India).
[38] Apurva Vishwanath, *Why hasn't plea bargaining taken off in India*, MINT (Aug. 31, 2016), https://www.livemint.com/Politics/otm5XvV7DTZJ9KaKScbJ4H/Why-hasnt-plea-bargaining-taken-off-in-India.html..
[39] K.V.K. Santhy, *Plea Bargaining in US and Indian Criminal Law Confessions for Concessions*, 7 NALSAR LAW REVIEW 1, 85, 87 (2013).

strategies for decision-making play their roles. In a bargain, it is hard that both parties are in the same position due to the influences of multiple factors. Similarly, in a plea bargain, as the offer is placed by the prosecutor, they are already in the driving seat. The prosecutor along with the ability to push charges (like in the U.S.A.) which may be accepted by courts if they apply marginally to the case, also has higher bargaining power as the defence lawyers may persuade the clients to accept poor bargains for maintaining their good relations with the prosecutor As Judge Jed S. Rakoff of the United States District Court for the Southern District of New York expressed,

> *"Although under pressure to agree to the first plea bargain offered, prudent defense counsel will try to convince the prosecutor to give her some time to explore legal and factual defenses; but the prosecutor, often overworked and understaffed, may not agree."*[40]

There seems to be an ultimatum presented to the defendants to accept or lose out on the opportunity of the bargain. This adapts closely to the ultimatum game in game theory, as discussed subsequently. Although it can be said such bargains may not always be so discrete, it is safe to say that the prosecutor, with higher bargaining power, can exert enough pressure to get his offer taken as final. Although there can be counter-offers that may add changes to the terms placed by the prosecutor,, the final terms will rest in the hands of the prosecutor and will require their approval.

Thus, a case of such a bargain can be explained from the viewpoint of a discrete ultimatum game. The Ultimatum Game provided by John

[40] Rakoff, *supra* note 9.

Harsanyi[41] was initially for the strategies of decisions regarding splitting a sum (of returns) between 2 players. In recent times, the model has transgressed into a far larger ambit including bargains, rather than becoming the primary game for explaining strategies around a bargain. In a discrete Ultimatum Game, a proposer offers certain terms and the responder has only two options, either to accept the terms or to reject the terms, and there is no option to present a counter-offer. If the terms are rejected, both parties get nothing while if there is acceptance, the bargain solidifies as per the terms of the proposer. The proposer may offer a fair or an unfair proposal. However, in an Ultimatum Game, the experimental evidence contradicts the equilibria right at the end. For example, in a game of splitting around 100 units between two parties, the most rational choice for the proposer is to offer 1 unit and keep 99 units. Here, the most rational response by the responder should be accepting the bill since 1 unit is still better than 0. Thus, the responder, on accepting, enters the Nash equilibrium (a place from where they cannot employ any better strategy to make terms more favourable to them). However, the experimenters Werner Güth, Ralf Schmittberger and Bernd Schwarze presented that in practical situations, people mostly offer a fair proposal which equally benefits both parties and offers below 30% are rejected[42]. It reiterates that humans are not actually always rational individuals. The same can be helpful in explaining the threat plea bargains present to innocents.

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[41] Harsanyi, J.C., *On the rationality postulates underlying the theory of cooperative games*. 5(2) JOURNAL OF CONFLICT RESOLUTION , 179, 180 (1961).

[42] Werner Güth, Ralf Schmittberger and Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. ORGAN. 367, 383-384 (1982).

Although, what first is to be understood is how the bargains in ultimatum games actually work.

Certain assumptions have been taken into consideration. Firstly, it has been proposed that both the prosecutor and the judge wish to reduce their caseload. Secondly, it is assumed that both the society including NGOs and social groups exert pressure on the judiciary while they regulate the sentences and charges after plea bargaining. Thirdly, and as provided, it is said that all the participants do not always take rational decisions while negotiations are underway.

As aforesaid, the prosecutor here acts as the proposer and the defendant acts as the responder. The defendant (whether with or without counter-offers) is left with two options, either acceptance or rejection.

A hypothetical illustration can be presented, where Mr. X of an imaginary state has committed a certain crime, say 123, against Ms. Y and got accused of the same in the court of law. He applied for a plea bargain. The maximum punishment for the offence of 123 in the state is 40 years. The prosecution has also pulled charges of offences of 987 and of criminal conspiracy with a maximum punishment of 20 years and 10 years, respectively. Thus, there are high chances of Mr. X getting sentenced for the three offences for a maximum of 70 years if the trial goes forward. Here, for him, accepting any offer for punishment under 70 years is a rational choice.

An important factor to consider are the social consequences of the decision of the plea, if it is accepted, that gives Mr. X a lenient punishment but it cannot be any lesser than a reasonable degree. It is presented that there exists a criticism that justice has not been met, which is an argument

already being made in other states like the U.S.[43] Moreover, Ms. Y as a victim holds certain retributive feelings owing to their losses against Mr. X. Thus, the prosecution is also under some pressure to maintain a surplus that can be termed as reasonable justice. Assuming the minimum punishment for 123, 987 and criminal conspiracy is 5 years, 1 year and 6 months respectively. Thus, the prosecution has a range of sentencing years to choose from starting from 0.5 (6 months) to 69 years which can shorten the punishment of Mr. X. The prosecutor also understands if the offer is rejected the trial will need to go on and it will result in more time and expenses to be incurred, and moreover, add to his and the caseload of the nation.

Empirical evidence presents that most people when playing as the prosecutor in a similar case tend to offer fair terms whereas, some go to the extent of reducing sentences and dropping charges to make the deal unfair to the victim in order to incentivize a quick acceptance. Very few of them dare to give an unfair deal that can result in counter-offers and elongate the processes. Although the accused in the study, knowing that they have committed a crime, wish to accept all offers even if it is unfair and may reject only when an offer is very unfair (such as a punishment of 70 years shortened by 1 year), those who reject also prefer to have the option of counter-offers that sees them presenting a fairer deal or even a deal unfair to them but with slightly better terms. This may be owing to their lower bargaining power in the game and the fact that even if a lenient punishment

[43] Fair Trails NGO, *Young minds, big decisions*, 28 (2022).; Daniel Boffey, *Rise of plea-bargaining coerces young defendants into guilty pleas, says report,* THE GUARDIAN (Oct, 6 2022), https://www.theguardian.com/law/2022/oct/06/rise-of-plea-bargaining-coerces-young-defendants-into-guilty-pleas-says-report.

is only marginally more favourable, it can be of their use to save a large period of time.

Thus, assuming in the aforementioned case, the prosecutor, being an experienced campaigner, deviates from the empirical results and presents an offer marginally unfair to Mr. X, he in all likelihood is likely to accept as that is the only rational response and it is still the response that gets him into Nash equilibrium.

Here the prosecutor cannot offer: -

(i) a deal unfair to the victim owing to the retributive feeling they carry in the bargaining and the social pressure;
(ii) a deal unfair to the accused as they can counter-offer to elongate the bargaining process, after which the prosecutor might need to come to a fairer deal.

Therefore, the prosecutor offers a deal by dropping the charges of 987 and criminal conspiracy in lieu of admission of guilt. This approach satisfies both, the victim and the social pressure, while also saving time for the prosecutor. This somewhere does present the elements of Rubenstein's bargaining as the prosecutor tries to save time and therefore, their best situation would be where the quickest offer is accepted.

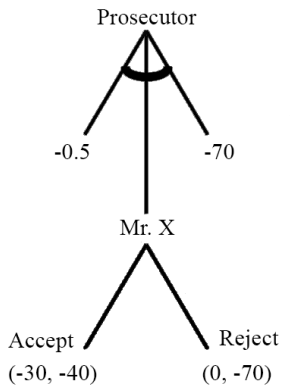

Fig 1: Game Tree of Plea Bargaining

Here the game tree is taking the values in negative as the responding party is eventually losing out on the crucial time of their lives through the payoff. The first value in the brackets presents the split received by the proposer (proposer's payoff) while the second presents the responder's fate (responder's payoff). The payoff for the prosecutor is also negative. The acceptance results in a certain surplus left with the proposer, this is although payment consideration for saving the court's time and expenses and stopping an increase in caseload, both these factors (time and caseload) are indifferent to its amount.

So, the proposer's payoff is negative because the prosecutor too is trying to maximize his surplus. A lower surplus will result in a high probability of social outrage and the victim's dissatisfaction, leading to higher criticism and lowering the image of the court and judiciary. For example, if the prosecutor waived 69.5 years and sentenced for .5 years his

surplus would have gone lower to -69.5 since the society would have reacted abrasively to such a decision. Similarly, a surplus of -20 will be more acceptable to society and reduces the possibility of criticism, therefore, making the prosecutor even better off from the position of -30. Therefore, both the prosecutor and the defendant are trying to minimize their losses to achieve benefits. Although due to this tedious and complex process issues may crop up.

A. HOW INNOCENTS MAY PLEAD GUILTY

The pleas have a wide scope of being misused too. The major reason behind this stems again from an unequal bargaining position to start with. The prosecutor's position is capable of creating enough pressure in itself to constitute a coercive fear that can force someone in a bargain to concede. Judge Rakoff also presented that "*a defendant's decision to plead guilty to a crime he did not commit may represent a "rational," if cynical*," choice due to the situation he's placed where he is uncertain of the result of the (jury) trial.[44] This is partially true as a defendant may base his strategy on uncertainty and pressure but moreover, this rather presents the irrationality of humans again.

In a normal situation where the accused knows that he's innocent, the rational choice in this situation would be of not going towards a plea bargain or outrightly rejecting the bargain. This is as, in case of the individual having perfect knowledge of their chances, he will know that the probability of facing penalty [$p_{(pen.)}$] is much lesser than the probability of

[44] Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Feb. 05, 2023). https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?lp_txn_id=1359216.

being acquitted in the case after being proven not guilty[$p_{(i)}$]. Therefore, when,

$$\mathbf{P_{(i)} > P_{(pen.)}}$$

the payoff for the accused in case of rejecting a bargain would be 0. In the case of Mr. X, if he was innocent and knew that his chances of being proven not guilty outweighed the chances of being convicted, then his payoff matrix in case of rejecting the bargain would have been 0 instead of -70 in terms of the years of punishment.

Therefore, a game in this situation of "rational" individuals would look like the following:

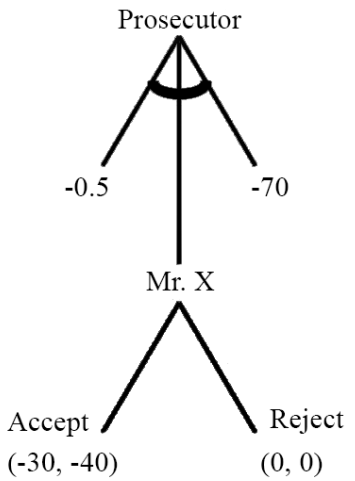

Fig 2: Ultimatum Game in case of Mr. X is Innocent and has Perfect Knowledge

Moreover, the prosecution will be investing time and public expenses in the trial and adding to the caseload, thus, they will be at working

against their best interests. Thus, rejecting or not opting for a bargain is the rational option.

However, it is an open secret that rational choices are not made. This may be due to the unequal bargaining power and the defence lawyers persuading the defendants for pleading guilty to save time, and maintain healthy relations with the prosecution or due to the unavailability of proper counter-evidence and investigation.[45] The persuasion and pressure of the situation force the innocent defendant to make an irrational estimate about his own chances to be proven guilty or not. Knowledge of probability in the eyes of the defendant may shift to

$$\mathbf{P_{(i)} = P_{(pen.)}}$$

or

$$\mathbf{P_{(i)} < P(_{pen.})}$$

$$\mathbf{And\ Pen. = O_{cp} + O_m P_a P_c}$$

$$\mathbf{Since\ Bargained\ Pen. = (O_{cp} - X) + (O_{cm} - X) P_a P_c}$$

$$\mathbf{\Rightarrow Pen. > B.\ Pen}$$

Where,

- X is the bargaining payoff for defendant;
- O_{cm} equals the monetary opportunity costs of conviction;
- O_{cp} equals the psychological costs of conviction;

[45] *Id.*

- P_a equals the probability of arrest; and
- P_c equals the probability of conviction.

Therefore, a plea bargain is the rational choice over the expected penalty effect for a person assuming his possibility of getting penalised is higher (or equal) than of being ruled innocent.

That again brings the defendant back to the original Ultimatum Game where he feels that the best interest lies in pleading guilty or else, he faces the threat of a higher punishment.

As more and more nations adopt the procedure, it is becoming necessary to solve this issue. If innocents keep getting into prisons through plea bargains, even in a small percentage, it can translate into a huge number in nations like India which have enormous populations.

B. WHY PLEA BARGAINS DO NOT HAVE A COMMANDING FORCE IN INDIA?

The criminal system in India is still far behind its American counterpart in enforcing plea bargaining procedures. The clear discernible cause can be that the application of bargains is only restricted to a few criminal acts. Moreover, there are multiple facets to this too, the most prominent of which is the bargaining power of the prosecutor is not as great as their American counterparts. The prosecutors in India are not a direct part of investigations as the prosecutors are provided with the information regarding a case by the police and the police bring charges against the defendant on the advice of the victim and thus, do not have a

large differential advantage over the defence lawyers.[46] Additionally, since their cases are not attached to the duty of investigation, quick disposal is not their prime concern. Thus, although the police authorities do work in consonance with the prosecutors, the prosecutors might not necessarily lobby defendants into disposing of the case with bargains.

Furthermore, the social stigma attached to prison sentences is huge, since the defendants also have the option to compound their offences (applicable to the compoundable offences given in the Criminal Procedure Code[47]), and prevent prison time by paying compensation to the victim, they will definitely pick that over plea bargains if they wish to mediate with the victim through a simple cost-benefit analysis. Since, under § 265-E of the CrPC the court may even grant compensation to the victim, here the costs of plea bargaining clearly outweigh the costs of compounding offences.[48]

A more paradoxical standpoint can be that where these plea-bargains in India were brought to remove the delay in disposal of cases, it might not even be considered as an option due to the same delay in cases. It is to be understood that since bails are the rightful norm, and there exists a prolonged delay in cases alongside a healthy acquittal rate, any defendant simply prefers bail over the task of going the extra mile to plead guilty and get convicted when they can use the presumption of innocence to their advantage due to the delay in trials for a long period of time.

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[46] LAW COMMISSION OF INDIA, 197TH REPORT ON PUBLIC PROSECUTOR'S APPOINTMENTS, 13 (2003).
[47] The Code of Criminal Procedure , 1973, § 320, No. 2, Acts of Parliament, 1974 (India).
[48] *Id.* § 265-E.

These reasons are not certainly all bad. Since there is a lower bargaining power of the prosecution, coercive pleas might be lessened too although this might not completely eradicate them. Solutions to other problems can help plea bargains to be effective through minor tweaks in the procedure. When it comes to the issue of innocents pleading guilty, India cannot be afraid of experimentation in the system.

IV. SOLVING THE UNNECESSARY EVILS OF PLEA BARGAINING

Plea bargaining has been a huge factor not just in the American criminal system, but also in various systems around the world. It would be safe to say that the procedure cannot be outrightly uprooted for it does present some merits, and a sudden dissolution will flood the criminal systems around the world with caseloads they do not have the necessary infrastructure to absorb. It is a question of economics on how the criminal systems in the U.S.A. need seven times their current strength to clear the cases if plea bargains are omitted[49]. Moreover, with the increased transplant of the procedure to various nations, plea bargains are here to stay. What needs to be amended is its 'double-edged' effect of creating a threat to the innocents who are accused of crimes. Not only does this threaten all ethos of justice but it attacks the principal argument of criminal systems which is to give all accused an opportunity to present their side of the story. Overcoming this blockade is even more important for a nation like India as it challenges the essence and base of its criminal system – Blackstone's

[49] Jed S. Rakoff et al., *Why Innocent People Plead Guilty: An Exchange*, N.Y. REV. BOOKS (Jun. 15, 2022). https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?lp_txn_id=1359216.

Ratio stating *"the law holds that it is better that 10 guilty persons escape, than that 1 innocent suffer"*.[50]

Through the ultimatum game, it is known that the root of this issue is the unequal bargaining power of the power that dictates the terms for the defendant. Thus, the solutions need to circle around either removing this inequality or bringing it to a position where it cannot influence the decision of the defendant. For the same, a good mechanism can be the power of a supervisor over these procedurally daunting tasks. Here, judges can act as great equalisers. A certain equaliser becomes more quintennial in India if plea bargains are to boom in the future, not only due to slow disposal rates but also due high rate of wrong detentions without a compensation mechanism to the exonerees.[51] Through this route, India, alongside a comprehensive plea-bargaining process, can target the issue of low conviction rates[52] but also mend the problems faced by under trails innocents under supervision of the judge creating a sense of pretrial without an actual trial.

A. HIS LORDSHIP, THE DETER, THE SUPERVISOR, THE REVIEWER

From an economic standpoint plea bargains are considered rights in exchange for rights (as one party waives a right against self-incrimination but receives a speedy disposal). Therefore, the judge holds no discretion whatsoever, in marshalling the defendant whether to accept or reject the

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[50] 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, (J.B. LIPPINCOTT CO. 1893).
[51] Karan Tripathi, *Guilty Until Proven Innocent: The 'Price' of Wrongful Prosecution,* THE QUINT (Jul. 27, 2021), https://www.thequint.com/news/law/the-price-of-wrongful-prosecution.
[52] Divya Shukla, *An analytical study of decreasing rate of conviction in India*, 4 INTERNATIONAL JOURNAL OF LAW 2, 91, 94 (2018).

guilty pleas. However, the presence of this discretion can be a game changer, especially in case of guilty pleas by the innocent. Exoneree Compensation is touted as a mechanism to give justice to innocents who have been implicated falsely or pleaded under the garb of coercion and got sentenced to imprisonment.[53] However, the goal should be of minimising the possibility of such coercive pleas in the first place.

The answer can lie if the judge is allowed to point his discretion in validating the pleas. Here, it is notable that the judge merely needs to validate that the plea is not inaccurate and made under coercion. Neither does the judge, in this case, present that the defendant is guilty or innocent, they just present whether the plea is coercive or not. This can work as a review mechanism. The judge trying to find a hint of *mens rea* if the defendant pleads guilty. If the review does not satisfy, the court may move forward into the trial. This initial step can be used as an experimental process, and that gradually solidifies its position in the system. The idea of how a review can be done was presented by Christopher Sherrin where he pointed out that such reviews are not supposed to be lengthy processes that counteract the goals of the plea bargain itself.[54] Rather this review can be through the acknowledgement of the correctness of the supporting facts. This can be through judging whether the accused can give an account of the happening and commission of the criminal act. Therefore, the judge will

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[53] Mungan, M.C. and Klick, J., Reducing false guilty pleas and wrongful convictions through exoneree compensation. THE JOURNAL OF LAW AND ECONOMICS, *59*(1), 173, 173 (2016).

[54] Christopher Sherrin, Guilty Pleas from the Innocent, 30 WINDSOR REV. LEGAL & SOC. ISSUES 1, 27 (2011).

be looking to obtain assurance by assessing whether *mens rea* was present. An example he presents is,

> *"In the average assault case, it would usually be sufficient to hear the accused admit to the nonaccidental application of force in circumstances not raising any issue of self-defence. In other cases more will be required, but the presiding judge would retain broad discretion to control the exercise and ensure that it is directed towards the relevant issues."*[55]

There is indeed room for evasive arguments made by the defendant but the process can indeed expose the gaps in arguments and reduce the instance of false pleas at least by some degree. Moreover, a review might not burden the courtroom but can act as a deterrence against defence lawyers trying to persuade innocents for personal gains and coercion by prosecutors. A more discretionary model has been successful in Germany where the German Criminal Procedure gives the judges a supervisory role in the bargaining process that allows them to go beyond police investigation and alter charges at their discretion, if charges presented by the prosecution do not fit accurately to the events of commission of the criminal act, by filing a notice.[56] Although the prosecutors enjoy higher flexibility in smaller crimes, the judges' approval is usually necessary when a prosecutor declines charges. Moreover, a prosecutor cannot make commitments on a particular term of the sentence as it is based on the discretion and supervision of the judge. Coming close to the German model may need an overhaul of the entire system but it does present a point that the aforementioned plea-

[55] *Id.* at 26.
[56] STRAFPROZEßORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE] §§ 214, 238, 241, https://www.gesetze-im-internet.de/stpo/ (Ger.).

bargaining process can be successful even with higher judicial involvement. Moreover, India can incorporate some features from the Inquisitorial System just like other Adversarial nations like Australia and the United Kingdom as stated by the Malimath Committee.[57] Conclusively, the review process here presents a lighter route without high judicial intervention but still an effective one.

B. THE CONNECTICUT EXAMPLE

The American federal system offers high variability in the criminal procedure that can help find innovative solutions to the issue. Changes in Connecticut are an example of the same.[58] The judge intervenes as an observer in the case and offers his merits to the parties on the advice of the case. They are on the pre-condition that they will not be allowed to adjudicate on the matter if and when the case leads to a trial on the failure of the plea bargain. Jenia I. Turner informs about a survey on the Connecticut system that explains that all parties including the judge, prosecutors and defence lawyers believe that such an intervention has 'enhanced' fairness in the plea-bargaining process.[59]

Subsequently, the American Bar Association recommended a more passive existence of the judge which has been adopted by Florida.[60] This gives the parties the option to reach out to the judge to explain the terms of the plea conditions. Although there may be hesitancy that may render it

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[57] DR. JUSTICE V.S. MALIMATH, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM, 27 (2003).
[58] Conn. R. Evid. § 4-8A (2000).
[59] Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. LAW 1, 199, 253 (2006).
[60] STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY? § 14-3.3(d) (AM BAR ASS'N 1997).

not as effective as other options, the existence of such provisions does offer a mixture of strategies to be employed for judicial intervention. An example can be the existence of a review mechanism as presented by Christopher Sherrin attached to Connecticut's method of removing the judge if the plea fails to remove biases.[61].

C. THEORETICAL DERIVATIVE OF JUDICIAL INTERVENTION IN A GAME SITUATION

MODEL / PARAMETER	Review	German	Connecticut	American Bar Association (Florida)
Period of Intervention	Ex-Post	Ex-Ante	Ex-Ante	Ex-Ante, optional on part of the defendants
Factual Probe	After Bargain, Liberal Discovery	Full Investigative File	Liberal Discovery, during bargain	Liberal Discovery, on option of the defendants
Method	Oral Presentation	Full Investigative File,	Oral Presentation and Summary	Oral Presentation and Summary

[61] Christopher Sherrin, *Guilty Pleas from the Innocent*, 30 WINDSOR REV. LEGAL & SOC. ISSUES 1, 27 (2011).

		Altercation in Charges	of Incidences (PC Affidavit*)	of Incidences (PC Affidavit*)
Discretion	Active, capability of rejection	Active, changes in charges and sentences	Passive, advisory	Passive, advisory

Comparison of Judicial Scrutiny Strategies

*PC Affidavit – Probable Cause Affidavit

Judicial intervention in plea bargains brings in a moderator in form of the judge to the game. The judge has a duty of being bipartisan due to their obligations of social welfare and justice. However, it is to be noted that the judge and the court do have similar interests in the success of a plea bargain like that of the prosecution. As it is in their best interest that there is not much caseload in their dockets, in a game of rational choices, the judge, therefore, has to be balanced towards both parties.

1) *In an Ex-Post Review*

There will not be a misuse of powers of moderation, supervision or review by rejecting all the pleas haphazardly as the judge would be cautious in his analysis and only rule out those cases where they feel there has been coercion or misrepresented inducement to get the bargain done. This is as the judge themselves does not want an increase in caseload. Moreover, the judge will also be cautious in accepting all the pleas without any reasoned judgement as multiple social organisations keep tabs on the incarceration

of innocents and the responsibility after the judicial intervention has shifted from the prosecutor to the hands of the judge. Moreover, with the option of exoneree compensation and post-conviction relief to challenge the guilty pleas (and the judge's review) present to the defendants, the judges have to maintain a cautious and reasoned approach to prevent these kinds of cases from coming back to the caseloads of the judiciary under trials for exoneree compensation.

2) ***In an Ex-Ante Supervision***

The Judge's role here has to be more related to deterrence over defence lawyers and less related to the analysis of the pleas. With intervention between the bargain, if the judge gets in with the power of altering charges and counter-advising the defendant in case the judge assesses misrepresented influence over him, they work in offsetting the differences in the bargaining power of the prosecutor and the defendant.

Although both these methods with additions, subtractions and innovations derived from the success of systems like Germany, Connecticut and Florida. There needs to be a mixture of schemes run as pilot tests as it is true that there cannot be 100% rational outcomes, although judicial scrutiny can at least to some degree reduce the incarceration of innocents through plea bargains as evidenced by the aforesaid systems which can then move forward to trials to prove not guilty.

V. TO GET PLEAS IN THE MAINSTREAM IN INDIA'S CRIMINAL SYSTEM

India has already partaken in experimenting with Plea Bargains, introducing processes of judicial scrutiny that need to be phased out in a

similar manner. The first step to popularise plea bargains is by building the confidence of the users of the bargain right from the beginning of the procedure. CrPC's mechanism is already laden with incentives to get into bargains ranging from compensation to including a custody period in the sentence. What is missing is awareness about such projects. From the empirical evidence, it is presented that a high majority has only heard of plea bargains but do not know about the specifics and the procedure, many laymen have never heard of it and only a minority of people know about the option.

Moreover, as mentioned before, people prefer bail due to the slow disposal and indeed that's the rational option. For tackling such issues, it is essential that the restrictions on the plea bargains in terms of the criminal acts they are applicable to, get loosened. For instance, these pleas procedures can be progressively spread to criminal acts that hold life imprisonment and the death penalty as a punishment. The rate of awarding the death penalty is on the rise in India. 2021 saw a 21% hike in the number of people on death row.[62] The deterrence of a rise in the death penalty can prompt defendants in getting into plea bargains. Through a simple cost-benefit analysis, it is evident that a defendant would prefer incarnation be it life imprisonment without parole over the death penalty. One of the most prominent examples is James Earl Ray, who pleaded guilty to the murder of Martin Luther King Jr to avoid the death penalty[63] in exchange for life imprisonment for 99 years. There are 12 offences in the IPC and 25 non-

[62] Project 39A, National Law University, Delhi, ANNUAL STATISTICS REPORT 2021, 7 (2022).
[63] Anthony Burton, *James Earl Ray pleads guilty for the assassination of Martin Luther King Jr.*, DAILY NEWS(March 11, 1969).

IPC offences that permit the death penalty. These are criminal acts like murder, dacoity with murder, kidnapping for ransom and rape with injury that causes death or a vegetative state etc. that sadly occupy a large amount caseload in India. Murder alone for instance had 29,193 registered cases in 2020.[64]

Indeed, this change cannot be radical and needs testing. Pilot tests can be engaged on offences punishable with the death penalty (For example, Kidnapping for Ransom). Gradually, upon the success of the pilots, it can be widened to similar offences which are punishable with life imprisonment (e.g., Kidnapping or abducting in order to murder). It can then be widened to cover an entire class of crime (e.g., Kidnapping). The essential is studying the practical application of plea bargain in this phased manner; the pre-requisite is adding procedure for judicial intervention in the bargaining process. This can help in not only streamlining pleas but also reducing instances of putting criminals on death row and stripping them of their right to life cynically. Focus can especially be attributed to non-compoundable offences.

[64] 1 NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA 2020, 2 (2021).

Crime Head	**Registered Cases in 2020**
Murder	29,193
Rape (Murder with rape/ Gang Rape)	28046 (226)
Kidnapping (for Ransom)	84805 (485)
Rape – Children	2655

Crime Heads Occupying Large No. of Cases in India (Punishable with Death Penalty)

Source NCRB – Crime in India 2020.

Conclusively, both these goals require rigorous analysis to understand what best fits. This has to be done while keeping the intent of the legislators, their preferences of whether they wish for a passive or active involvement as well as the situation of the prevalence of plea bargains at every step of making amendments.

VI. CONCLUSION

Plea Bargains have been a huge transformative force in multiple nations around the world. Updating and amending the procedure to better absorb its transplant is also a continuous process for these nations.

Moreover, procedures, as such, become more important for nations like India which have an enormous number of cases to dispose of. Plea bargaining, if it attaches to the ideals of fairness, can become a tool that can drive India towards a position where it upholds the right of speedy trial as a fundamental requirement. Thus, this requires the effort of the authorities to amend-assess-analyse and solidify the process. As pointed out by the Supreme Court of India "*the right to a speedy trial is not an expressly guaranteed constitutional right in India but is implicit in the right to a fair trial*".[65] It is upon the authorities to uphold it by balancing the bargaining power of the prosecutors and the defendants.

This fair trial can come through appropriate strategies by the players of the game. The best game strategies come only when the bargains are fair to start with. Plea Bargains, as game theory tells us, are an activity timidly balanced on unequal bargaining power. At the same time, it reemphasises the shaky rationality of people when exposed to such unequal bargains. The game itself presents the solution, the solution of supervisory authority, governed by the rationality of the game itself. The application of the changes depends upon how the authorities move their pieces in the game

[65] Hussainara Khatoon & Ors v. Home Secretary, State Of Bihar, AIR 1979 SC 1360 (India).